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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 955

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

JOSEPH DEL RASO, HORACE SYBERT, QUINTEN BENSON and LUDWIG DALPIAZ,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST JUDICIAL DISTRICT.

The petitioner-railroad is asking this Court to review two questions—whether there was evidence of contributory negligence and whether the petitioner had actual or constructive notice of health hazards—in a Federal Employers' Liability Act case where the trial court and jury held adversely to the petitioner, where the Illinois Appellate Court affirmed the judgment and where the Illinois Supreme Court refused to review the Appellate Court's judgment.

In answer to the petition the respondents contend that (1) the trial court was correct in withdrawing the issue of contributory negligence from the jury since there was no proof whatsoever of contributory negligence and the fact that the respondent-employees continued to work after becoming ill is possibly evidence of assumption of risk but is not evidence of contributory negligence, particularly when the respondents were threatened with discharge when they complained to their foreman about their illness; and that (2) the petitioner-railroad (a) had repeated actual notice that the acetylene cutting of painted railroad cars was causing occupational illness and (b) in any event was bound to provide a safe place for its employees to work and to provide safe materials with which to work, and was presumed to know that the inhalation of smoke and fumes from the cutting of metal painted in 1937 was inherently dangerous.

REASONS FOR DENYING THE WRIT.

I.

THE PETITIONER'S ARGUMENT THAT THE ISSUE OF CONTRIBUTORY NEGLIGENCE SHOULD HAVE BEEN SUBMITTED TO THE JURY IS MERELY AN ATTEMPT TO RESURRECT ASSUMED RISK UNDER ANOTHER NAME.

This Court has said that "the theory that a servant is completely barred from recovering for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon." *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54 at 66-7.

Under Illinois law, the knowledge of an employee as to the dangers of his employment is a matter of assumed risk. 17 Illinois Law and Practice, "Employment," §§171, 172, pages 534-6. Where the employee has equal knowledge or means of knowledge with his employer also involves the question of assumption of risk. §173, pages 536-7. Continuing to work after knowledge of danger is also a question of assumed risk. §176, pages 538-9.

In *Howard* v. *Gulf, Mobile & Ohio Railroad Company*, 13 Ill. App. 2d 482, 142 N.E. 2d 825, the Illinois Appellate Court, in affirming a judgment for an employee under the Federal Employers' Liability Act, said at 829:

> ". . . it is common in these cases for the carrier to argue, without evidentiary basis, that the plaintiff could

> have given orders or made requirements, before proceeding in the usual course of his employment. Then it is asserted that he was guilty of contributory negligence for performing his duties without protest in the presence of risk. The defense of assumed risk cannot be revived under some other name."

The only "evidence" of contributory negligence, under the petitioner's argument, is that the respondents continued to work after becoming ill. The continuous and repeated complaints to their foreman by the respondents, removed any possible implication of contributory negligence on their part. 17 Illinois Law and Practice, "Employment," §181, page 554; §193, page 550; §195, pages 552-3; *Chicago Screw Co.* v. *Weiss,* 107 Ill. App. 39, 44.

The foreman threatened to discharge them when the respondents complained (A. 38, 89).

II.

THE PETITIONER FAILED TO PROVIDE THE RESPONDENTS WITH A SAFE PLACE TO WORK AND IN ANY EVENT WAS PUT ON ACTUAL AND CONSTRUCTIVE NOTICE OF THE HEALTH HAZARDS INVOLVED.

The petitioner-railroad failed to provide the respondents with a safe place to work. *Bailey* v. *Central Vermont Ry., Inc.,* 319 U.S. 350, 352-3; *Kreigh* v. *Westinghouse, C., K. & Co.,* 214 U.S. 249, 256, 257; *Patton* v. *Texas & P. Ry. Co.,* 179 U.S. 658, 664. As this Court said in the *Bailey* case, "That rule is deeply engrained in federal jurisprudence."

But beyond that, the record contained the following uncontradicted evidence of actual or constructive notice that there was a hazard to the plaintiffs' health:

(1) Benson told his foreman Koleto near the end of October, 1955 (A. 38): "I am not feeling very good lately, I noticed it ever since I got on this smoky job you put me on. I think the smoke is getting the best of me. I think there is something in that paint there."

(2) Dalpiaz told his foreman Koleto at the end of October, 1955 (A. 56): "I'm sick all the time. I have the stomach pains here lately. It's either that smoke or paint or something."

(3) Del Raso asked his foreman Koleto in the last part of October, 1955, to send him to the hospital but Koleto refused (A. 89, 92).

(4) Benson complained again to Koleto in the first part of November, 1955 (A. 38-9).

(5) In the middle of November, 1955, Benson, Dalpaiz, Del Raso and a few other men "were getting so much smoke we stepped back for a few minutes. We were sick, we were going to take a little break. They sent us to the office and we were laid off for nine days" (A. 39).

(6) Del Raso complained to Koleto again in November, 1955, and Koleto threatened to fire him (A. 89, 92).

(7) The respondents offered to prove that after Koleto refused to listen to their complaints about their illnesses, Dalpiaz and Del Raso appealed to a foreman in the car shop who had been a relief foreman on the stripping track, Reuben Robertson, and told him in late October or early November that the fumes on the stripping job were making them sick, but Robertson refused to do anything and told them to go back to Koleto (R. 509-519).

(8) About two months after the first complaints to Koleto, Del Raso entered the hospital on December 22, 1955 (A. 89). Sybert entered the hospital on January 17, 1956 (A. 66, 76), Benson on February 4, 1956 (A. 39-40, 66) and Dalpiaz on February 15, 1956 (A. 66).

In *Urie* v. *Thompson,* 337 U.W. 163, relied upon by the petitioner, this Court held that the employer's knowledge, actual or constructive, is a jury question (pages 178-9). The Court then quoted from *Sadowski* v. *Long Island R. Co.,* 292 N.Y. 448, 55 N.E. 2d 497, 500, where the Court said that "it is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which defendant was bound to know."

In the present case, the petitioner's own doctor testified that "lead poisoning in industry was a problem back to the time of the Ancient Greeks" (A. 73) and that "these men were exposed to cutting fumes from the actual process of repairing equipment" (A. 65).

Thus, the railroad had ample actual notice and was charged in law with constructive notice that railroad cars manufactured and painted in 1937 were or might be painted with lead paint and that inhaling the fumes from cutting the paint-covered metal was inherently dangerous.

The refused instruction quoted on pages 10-11 of the Petition for Certiorari was, as the Illinois Appellate Court pointed out in the opinion below, a peremptory instruction improper under Illinois law (Petition, pages 18a-19a; *Cohn* v. *Petroleum Heat & Power Co.,* 44 Ill. App. 2d 23).

CONCLUSION.

The respondents pray that for the reasons stated in this brief the petition for a writ of certiorari be denied.

Respectfully submitted,

NAT P. OZMON,
188 W. Randolph Street,
Chicago, Illinois 60601,
FRanklin 2-3822,

ROBERT A. SPRECHER,
111 W. Monroe Street,
Chicago, Illinois 60603,
RAndolph 6-2468,

Attorneys for Respondents.

MEYER Z. GRANT,
Of Counsel.